**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 22 OF 2015**

**AHMED MUHSIN MOHAMED …..... APPELLANT**

**VERSUS**

**REPUBLIC …..... RESONDENT**

(From the Original Conviction and Sentence in Criminal Case No. 847 of 2012 of the Chief Magistrate's Court at Malindi – Y.A. Shikanda, SRM)

**JUDGEMENT**

The appellant was found guilty of the offence of attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act Number 3 of 2006. The particulars of the offence were that the appellant on the 18th day of December, 2012 at Malindi District within Kilifi County, unlawfully and intentionally caused his penis to penetrate the anus of H K A a child aged 15 years.

The trial court sentenced the appellant to serve ten (10 years imprisonment. The grounds of his appeal are: -

1. **That the conviction is unsafe as the evidence was insufficient and mainly hearsay.**

2. **That the prosecution evidence was not corroborated to sustain the conviction.**

3. **That the appellant was not served with the prosecution evidence in advance.**

4. **That his Alibi defence was ignored.**

5. **That whereas the appellant was charged with the offence of attempted defilement, the trial court proceeded as if he had been charged with the offence of defilement.**

6. **That the trial court erred in law and fact by convicting the appellant with attempted defilement after acquitting him of the offence of defilement.**

Parties agreed to determine the appeal by way of written submissions. Counsel for the appellant contends that the medical evidence proved that the complainant was not defiled yet he reported that he had been sodomised. The complainant was 15 years old and there was no evidence of struggle. Counsel reiterate that if indeed the incident occurred, how comes the complainant did not push the appellant aside. According to counsel, the evidence of PW2 is doubtful and unbelievable. PW2 alledged that there was

insertion of the appellant's penis yet the medical evidence does not support that. The evidence of PW3 was just hearsay.

It is further submitted that the trial court erred in law when it delivered a ruling based on a charge of defilement yet the appellant was charged with attempted defilement. The investigating officer did not testify. PW2, the complainant made reference to the presence of a young man who was not called to testify. The trial court believed the testimony of the complainant yet his evidence did not sustain the charge. Counsel also contends that the appellant's defence was not considered.

Counsel for the appellant relies on the case of **D.O.O. -V- REPUBNLIC** Siaya High Court Criminal Appeal No. 5 of 2015 in relation to the contention that Article 50 (2) of the Constitution was not complied with. The court allowed the appeal as the appellant had not been supplied with witness statements. Counsel also relies on the case of **ELIAS KIAMALI NJERU -V- DPP**, Embu Criminal Appeal No. 1 of 2015 where the appeal was allowed on the basis that the trial court relied on the evidence of a single witness.

The state opposed the appeal. Miss Mathangan, prosecution counsel, maintains that the charge of attempted defilement was proved. The complainant narrated to the court what happened to him. He positively identified the appellant as he knew him. Counsel contends that witness statements were supplied to the appellant. The appellant's defence did not raise any alibi evidence. Although in a ruling as to whether the appellant had a case to answer the trial court thought that the appellant was charged with the offence of defilement, that error did not occasion any harm on the appellant.

The issues for consideration are whether the evidence was sufficient to sustain the charge, whether the prosecution proved its case beyond reasonable doubt and whether the conviction is safe. Three witnesses testified for the prosecution case. PW1, **IBRAHIM ABDULLAHI** is a clinical officer who was based at Malindi District Hospital. He examined the complainant on 19.2.2012 and filled a P3 form. This was one day after the incident. He noted that there were no bruises. PW2's anus was intact. There was no spermatozoa. There were no injuries on the anus. There was no obvious sign of penetration. There were bruises on the polion. According to PW1, if lubricants are used or if the victim had been sodomised before, no injuries can be detected.

PW2 was the complainant. He testified that he was 15 years old and a standard eight pupil. He met the appellant on 17.12.2012 at 4.00 pm. He knew him before. The appellant told him that there would be a funeral prayer at Riyadha mosque the following day 18.12.2012 at 4.00 pm. The appellant asked him to attend. On18.12.2012 PW2 went to the Mosque at 4.00 pm. There was no function and the mosque was open. He decided to go to the toilet to relieve himself. As he was closing the door, someone pushed it and entered. He saw the appellant who covered PW2's mouth with his left palm. He pushed PW2's trouser and unzipped himself. PW2 was pushed to face the door. He placed his pennis between PW21's buttocks. He attempted to insert it into PW2's anus but did not go far. PW2 heard somebody open a water tap outside. The appellant covered PW2's mouth with both hands and when the person who was outside left, the appellant ran out of the toilet. PW2 dressed himself and met a young man who used to clean the mosque. PW2 narrated what had happened to him and mentioned the appellant's name. PW2 went with the young man to the appellant's home which is near the mosque. People gathered and beat up the appellant. The police arrived and took him to Malindi police station. It is PW2's evidence that the mosque cleaner was later sacked from the mosque.

PW3 is PW2's mother. She was attending a wedding in Mombasa on 18.2.2012 when she was informed about the incident at 7.00 pm. She travelled to Malindi on 19.2.2012 and went to Malindi police station. She produced PW2's birth certificate showing he was born on 19.1.1997.

In his unsworn defence, the appellant testified that on 18.12.2012 he was at Kilimanjaro shop opposite Tawakal booking office. He met PW2 who was his friend. It was about 5.00 pm. He told the young man (PW2) that there would be teachings at Riyadha mosque and asked him to attend at magrib time. He then went to Riyadha mosque to relieve himself. He entered into a toilet while PW2 entered into another toilet. When he came out of the toilet he found PW2 being held by another young man. The appellant

left and went home. While on his way some people accosted him alledging that he had defiled a child. He was assaulted by members of the public. Police officers arrived at the scene. He was taken to Tawfiq Hospital by the police.

The record of the trial court shows that initially the appellant was charged with the offence of defilement. On 27.2.2013, the charge was substituted to attempted defilement. The appellant denied the charge of attempted defilement. On the same day, the appellant informed the court that he had not been supplied with witness statements. The trial magistrate adjourned the case to enable the appellant obtain copies of the witness statements and other relevant documents. The case was fixed for hearing on 23.4.2013. On that date the case was adjourned to 13.6.2013 but still the matter did not proceed. It was adjourned to 29.8.2013.

On 29.8.2013 the appellant informed the court he was ready to proceed. The appellant did not raise the issue of statements. Two witnesses testified. The record shows that on 27.2.2014 Mr. Obaga advocate appeared before the court holding brief for Mrs. Chesaro who had come on record for the appellant. Mr. Obaga indicated that Mrs. Chesaro had no copies of witness statements. Miss Mathangan, the prosecuting counsel, informed the court that the appellant was supplied with copies of witness statements. The case was adjourned. When it resumed on 19.5.2014, the appellant informed the court that he was ready to proceed without his advocate. From the record, it is clear that the appellant was supplied with copies of witness statements. The contention that Article 50 of the Constitution was not complied with is not proved.

There is the issue of the trial court acquitted the appellant on the offence of defilement but convicted him on attempted defilement. The record shows that in his ruling of 10.2.2015 the trial court acquitted the appellant of the offence of defilement but placed him on his defence on attempted defilement. It is evident that the trial magistrate made reference to the initial charge sheet of defilement instead of the substituted charge sheet. The appellant was charged with the offence of attempted defilement and was put on his defence on that charge. I do find that the mistake or error of the trial court did not occasion any failure of justice. The mistake is covered under Section 382 of the Criminal Procedure Act. This ground of appeal cannot help the appellant. The trial court did not find that the appellant had a case to answer for a charge of defilement.

Counsel for the appellant contends that the appellant tendered an alibi defence. The appellant's defence is that he went to Riyadha mosque on 18.121.2012. He saw the complainant. They each entered separate toilets. He found the complainant being held by another young man. The appellant left for his house but was accosted by people on the way.

The Black's law Dictionary defines an alibi defence as a defence based on the physical impossibility of a defendant's guilty by placing the defendant in a location other than the scene of crime at the relevant time. It also defines it as the fact or state of having been elsewhere when the offence was committed. The complainant informed the court that the offence was committed in a toilet at Riyadha mosque. The appellant's evidence is that he was at Riyadha mosque on that day and time of the offence but in a different toilet. I do find that there was no alibi defence. The appellant was just at the scene of crime and not far from it. The ground that the trial court did not consider the appellant's alibi defence fails. It is further contended that the investigating officer did not testify. That is true. Only three witnesses testified. PW2 and his mother PW3 as well as the clinical officer. The record shows that the investigating officer, P.C. Vincent Ayumba, had been transferred to Nairobi last adjournment had been granted to the prosecution and the case was closed. The P3 form shows that the case was reported at Malindi police station under occurrence book reference (O.B) number 89/18/12/2012. It is therefore established that the case was reported to the police. The P3 form was produced as Exhibit one for the prosecution. PW3 produced the birth certificate for the complainant. It is clear to me that even if the investigating officer did not testify, all the relevant documents were produced. No adverse inference can be drawn against the prosecution's case. Similarly, PW2 testified that the young man who used to clean the mosque was sacked. The fact that he was not called to testify did not discredit the prosecution case.

Apart from the above, tee is the issue as to whether the evidence was sufficient to sustain the charge. The

medical evidence is not very helpful. No bruises or injuries were noted on the complainant's anal area. According to the complainant, the appellant tried to sodomise him. He removed his clothes and placed his pennis between PW2's buttocks. He tried but did not go far. What can be deduced from that line of evidence is that the appellant tried to use force to penetrate PW2's anus. The evidence that he did not go far leaves some unanswered questions. How far did the appellant go in his attempt to sodomise PW2. Why is it that no bruises or cuts were noted by PW1, the clinical officer yet the appellant was somehow using force.

The evidence on record in relation to the occurrence of the attempted sodomy is that of the complainant against the appellant. PW2 was 15 years old. I did not have the advantage of seeing PW2. I saw the appellant and he looked elderly and a man of small body frame. It could be possible that the appellant could overpower PW2 but from his appearance, a young energetic boy aged fifteen years old can easily push the appellant away. The appellant was not armed and it is not clear how he could manage to block PW2's mouth with one hand and use the other hand to remove PW2's, unzip himself while PW2 does not offer any resistance and simply wait. It's not clear where were PW2's two hands all this time. PW2's hands were not tied with a rope.

Another issue for serious consideration is the time of the incident. According to the complainant, the incident occurred at 4.00 pm. This is the time for the Asr prayers. In many mosques the prayer is prayed at exactly 4.00 pm or 15 minutes before or after. PW2 saw few people upstairs meaning anyone coming to the mosque will have to pass through downstairs and see the toilets even if at a distance. It is not clear why at 4.00 pm, a time for Asr prayers, no one saw the appellant pushing the door into the toilet where PW2 was. No one heard the two struggling inside the toilet. While the appellant was pushing the toilet door, PW2 had the opportunity to shout and he would have been assisted. It cannot be that the appellant pushed the door and abruptly held the mouth of PW2. Why didn't PW2 try to remove the one hand blocking his mouth. All these issues raise some doubt as to the occurrence of the incident. There is a possibility that the incident did occur and equally it could be possible that it never occurred. The second possibility is strengthened by the timing and place of the offence. The investigating officer did not testify. According to PW2, he met the mosque cleaner. According to PW2, the cleaner was dismissed from his job. The incident occurred on 18.12.2012. PW2 testified on 29.8.2013. There was no indication that the mosque cleaner had recorded his statement with the police. According to the record, the only witness who did not testify is the investigating officer. It is not clear why the mosque cleaner did not testify or at least someone from the mosque to confirm that such an incident took place at the mosque.

Section 124 of the Evidence Act allows the court to convict an accused person in sexual offences cases even if the only evidence is that of the complainant so long as the trial court believes that evidence. The trial court did believe the evidence of PW2. I find some doubt n PW2's testimony as to how the incident occurred. I also find it difficult to agree with PW2's version that he met the mosque cleaner and went to look for the appellant. The prosecution never mentioned him to be part of the witnesses. Further, the timing of 4.00 pm is quite crucial as it is time for prayers and many people would visit the toilets before entering the mosque. I do find that the appellant is entitled to the benefit of doubt.

In the end, I do find that the conviction is not safe. The appellant is entitled to the benefit of doubt. The appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

**Dated and delivered in Malindi this 27th day of June, 2016.**

**S.J. CHITEMBWE**

**JUDGE**